

Strategic Video
"Stock Video for the Digital Age"

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of
Implementation of Sections of the
Cable Television Consumer Protection
and Competition Act of 1992:
Rate Regulation
Leased Commercial Access

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MM Docket No. 92-266

CS Docket No. 96-60

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**REBUTTAL COMMENTS ON
THE ORDER ON RECONSIDERATION
OF THE FIRST REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING**

By Thomas M. Schaefer, Owner, Strategic Video

27 May 1996

1. I am a small independent video producer located in Lodi California who is struggling to begin leased access programming. I am generally opposing some of the comments provided by cable operators, their production affiliates, and national programming networks.

2. I would like to ask the Commission to read the introduction to the survey conducted by The Research Network for Continental and brought before the Commission as evidence that they will lose customers if leased access replaces existing programming. The Commission should question the motives of a company that would use the words "ethnically oriented" to describe leased access programming in a survey given in the racially divided and tense Broward County. Continental, I'm sure, was well aware of the reaction these words would solicit.

3. Every good-hearted American should be offended by Continental's naked attempt to evoke a racist response and exploit that response to further its own economic interests before the Commission. Conducting their survey and bringing it before the Commission in this matter is

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is tantamount to an admission that they have silenced "ethnically oriented" voices in order to gain market share. This survey is equivalent to a real estate broker conducting a survey in a predominantly white neighborhood to see if the residents believe the sale of properties to minorities would affect their property values, and then using that survey to argue before HUD that they should not be required to sell real estate to minorities because it would affect their profits. I request that the Commission censure Continental, throw out the entirety of their comments, and refer their comments to the Civil Rights Division of the Justice Department on First Amendment grounds.

4. Having read nearly 1,200 pages of comments over the last three days, it seems to me that the debate revolves around whether large, mostly established, mostly national programmers have the right to occupy all non-must-carry channel capacity in preference to mostly new and small local programmers. The great bulk of the comments from the established big media support the status quo, and argue that any change that would upset the status quo would be bad for viewers and the programmers alike.

5. First, it is argued that the existing leased access regulations have allowed a diversity of programming and sources to blossom as Congress intended. If one accepts the arguments made by Time Warner and others that quality local programming is not cost effective, that may be true. However, as an individual who is attempting to produce high quality local programming, I do not accept Time Warner's premise. The cost of the equipment necessary to produce quality programming is dropping by a factor of two every six months. For approximately \$150,000, I have equipped myself with a production capability that would have cost several million dollars in 1990, if it was even available. With the advent of DVC digital video tape camcorders, Firewire, and Intel's MMX technology, by the end of 1997 \$25,000 will purchase all the equipment needed to produce network-affiliate quality programs. By the year 2000, anyone with a current desktop computer will be able to edit VHS quality video and affordably deliver it in MPEG-1 format over T1 lines to a cable or VDT head end. Currently, affordable production tools are not the problem, distribution is. The cable operators and national programmers are seeking to delay for as long as possible the competition posed by local programmers equipped with these powerful tools, by

restricting distribution. They do not want video delivery to go the way of the Internet, where web sites must compete on content, unprotected by distribution gatekeepers.

6. Second, they argue that any revision of leased access regulations that would upset the status quo would be an unfair, or even unconstitutional, taking of channel capacity and programming discretion. The Fifth Amendment arguments made by Time Warner are a tired rehash of their must-carry litigation arguments, which the Administration has already rejected. As controllers of the only practical way to distribute video programming locally, the cable operators have a monopoly. (The argument made by Continental that video cassette distribution is a practical alternative ignores the fact that the two largest video cassette sales and rental outlets will not stock local commercial videos). As local monopolists over the most prevalent form of communication, First Amendment considerations must be considered as well. If leased access is not made practical by this rule making, unaffiliated local commercial television voices will be effectively silenced. If that comes to pass, the Commission should initiate or support anti-trust litigation to prohibit commercial local origination production by cable operators.

7. Third, they argue that low quality leased access programming will drive subscribers away to DBS or other alternatives. For starters, any criticism of the technical quality of leased access programs is specious. The majority of cable operators have chosen not to invest in high quality playback equipment, or even to allow one to place one's own equipment at their head end. As a result, local origination programming is noticeably lower in quality than satellite feeds or over-the-air programming. Given the affordability of high quality playback tape decks, one can only assume that many cable operators *want* local programming to look bad so there won't be much. Any argument made about infomercials and home shopping making up the bulk of leased access is also specious. The cable operators produce and air much of this programming (QVC, HSN, and infomercials on numerous channels). Many UHF broadcast stations exhibit infomercials for 18 hours a day, but that doesn't deprive them of their must-carry status. One can only assume the cable operators do not want any local competition for their infomercial and home shopping programs. At first, many leased access programmers will be new and in-experienced, resulting in associated production problems. (Even the major networks went through this process at one

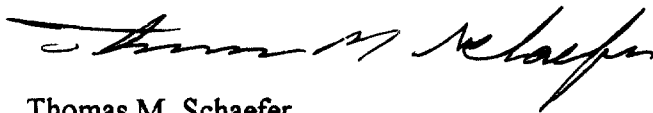
time). If leased access programmers are given a real chance, practice and competition will improve the content of their programming.

8. Fourth, TCI, Time Warner, and Continental point to the lack of leased access complaints before the FCC as evidence that there is no problem with the current regulations, or interest in leased access for that matter. Most up-and-coming video producers do not pursue complaints against cable operators because they believe such complaints are futile. The actions (or lack thereof) of the FCC regarding leased access have become well known, and there is a common belief that the FCC sides with the established industry in any dispute. (This rule making would not be taking place were it not for the ValueVision law suit, after all.) Weak and slow enforcement of existing regulations has driven video producers to other pursuits, as they generally can not afford a protracted struggle against a cable operator with unlimited resources. I myself have lost a house and tens of thousands of dollars in so-far unsuccessful confrontations with cable operators over leased access. If not for my wife's income and savings, I would have been forced to abandon these confrontations also. Yes, the cable operators have succeeded in crushing demand for leased access, but that does not mean the FCC should endorse this victory by continuing its ineffective regulations and enforcement. When it becomes clear the FCC administers justice, there will be hundreds who will seek it.

9. Fifth, the cable operators are arguing for phase-in periods as long as four years. Any phase-in of the new rules longer than one year will render them moot, and the cable operators know it. The cable operators are already planning "legislative remedies" for the "leased access problem" (overheard at this year's NAB convention). If the Commission adopts new rules the cable operators find bothersome in the least, all their effort that went into this comment period will immediately turn to lobbying. By making your rules effective immediately, there will be at least a brief opportunity for leased access programmers to demonstrate to cable operators that high quality local programming actually attracts viewers to their systems, and the best of us may be allowed to stay after the cable operators get the law changed.

10. Finally, there are several points made by the cable operators that I do agree with. Requests for leased access should be made in writing, as this will provide documentation for the almost inevitable dispute that will arise. The cable operator should be given fifteen (15) days to respond to a request, as this is insignificant compared to the months the programmer will likely be kept waiting while the cable operator obfuscates and the FCC rules on a complaint. I agree that cost/market will likely unfairly under-compensate some cable operators, encouraging them to be even more obstructive than they are now. I prefer the industry average method proposed by VIPNA.

11. In summary, the cable operators and national programmers believe they are good and leased access is bad. If national and broadcast voices are the only ones to be heard on TV, that is true. 80% of Americans work for or own small businesses that mostly cater to a local economy, yet 80% of television advertising comes from big business. By adopting and enforcing effective leased access rules, you will give a television voice to the most dynamic and job-creating segment of the economy. I thank the Commission for allowing me to participate in this process and believe that we will all be satisfied, one way or another, when bandwidth and distribution channels are no longer scarce resources. Until then, please make leased access practical.



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